Supreme Court, U.S.
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No. 00-744

In the Supreme Court of the United States

ILLINOIS COMMERCE COMMISSION, ET AL.,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this court should grant certiorari to review a decision of a court of appeals where, after that decision was rendered, the district court entered an order dismissing all of the claims in the lawsuit with prejudice and that dismissal order was not appealed.

2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Illinois Bell Telephone Company. d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). Under that new regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal substantive standards created by the Act. *Id.* at 377-78 & n.5; see also 47 U.S.C. § 201(b). As Justice Scalia's opinion for the Court explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.*, 525 U.S. at 378 n.6. At the same time, Congress established a new, voluntary role for state regulators to help administer the Act. If the state regulators choose to discharge their delegated responsibilities under the Act, their actions are reviewable in federal court. 47 U.S.C. § 252(e)(6) & (4). If the state regulators decline the regulatory role offered to them by Congress, the FCC must assume that role. 47 U.S.C. § 252(e)(5).

B. Section 252 Interconnection Agreements. The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Most significantly, sections 251

and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1). In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously-approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2).

C. Judicial Review and FCC Preemption of State Commission Inaction. Although the Act does not require state regulators to participate in the new federal scheme for the regulation of private telecommunications carriers, those state regulators who choose to participate are not simply "allowed to

do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators do so is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by that "determination" to bring an action in "Federal district court" to determine whether the state regulators have met "the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the Federal Communications Commission ("FCC") performs the prescribed regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "deputized federal regulator[s]" (Pet. App. 43a), the Act mandates that the FCC "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). And like state commission "determinations under section 252," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by a state commission or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of federal telecommunications law through section 252 agreements, notwithstanding the involvement of state regulators

in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

D. The Proceedings Below. Petitioners arbitrated and approved a federally-mandated section 252 interconnection agreement between respondents MCI and Ameritech. Following petitioners' approval of the agreement, MCI filed an action in federal district court pursuant to section 252(e)(6) of the Act seeking review of petitioners' determinations. Ameritech filed a cross-claim against petitioners and a counterclaim against MCI. Petitioners moved to dismiss the federal court action, asserting Eleventh Amendment immunity. The district court denied the motion, holding that petitioners had waived their immunity by participating in the federal regulatory scheme under the Act (Pet. App. 92a) and that, in the alternative, respondents could maintain an official capacity suit against the Commissioners under the *Ex parte Young* doctrine (*id.* at 102a).

The Seventh Circuit affirmed, holding that "the Eleventh Amendment does not bar these suits against the state commissions and their commissioners" for two "independent" reasons. Pet. App. 6a.[1] First, the court held that "in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Id.* Second, the

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[1] The Seventh Circuit consolidated the appeal from the district court's decision in this case with four related Wisconsin cases which the Wisconsin district court had dismissed on Eleventh Amendment defense. The Wisconsin Commission and Commissioners also have filed a petition for a writ of certiorari, No. 00-653, in which they seek review of the Seventh Circuit decision below.

court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id.* In reaching its conclusion on waiver, the Seventh Circuit expressly relied (Pet. App. 31a-43a) on this Court's decisions in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The court also noted its agreement (Pet. App. 39a-41a & n.8) with the Tenth Circuit's waiver analysis and holding in *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). With respect to the applicability of *Ex parte Young*, the Seventh Circuit "agree[d] with the Sixth and Tenth Circuits that these suits are 'straightforward' *Ex parte Young* cases" (Pet. App. 46a), and squarely rejected (*id.* at 47a-53a) petitioners' contentions that this Court's decisions in *Seminole Tribe* and *Coeur d'Alene Tribe* required a contrary result.

After the case was remanded to the district court, MCI and Ameritech jointly moved to dismiss all of their respective claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2). On October 13, 2000, the district court granted the motion and dismissed the case in its entirety. Petitioners did not appeal that dismissal, but instead filed a motion in the Seventh Circuit asking that court to recall its mandate and to vacate its judgment. On November 15, 2000, the Seventh Circuit denied petitioners' motion.

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT, ON REMAND FROM THE SEVENTH CIRCUIT, DISMISSED THIS CASE, AND PETITIONERS DID NOT APPEAL THAT DISMISSAL

As an initial matter, this case is an exceptionally poor vehicle for consideration of the questions presented because the case has been dismissed. As petitioners concede (at 8), after the Seventh Circuit remanded this case to the district court, MCI and Ameritech jointly moved for a voluntary dismissal of their claims. On October 13, 2000, the district court granted the motion and dismissed the case in its entirety. Petitioners did not appeal the district court's dismissal order, but instead requested that the Seventh Circuit recall its mandate and vacate its judgment. In that motion, petitioners stated that "[t]he Commission believes that the district court's decision dismissing the case with prejudice prevents further appellate review in this case." Motion of Illinois Commerce Commission and its Commissioners to Recall Mandate and Vacate Judgment in Appeal 98-2127, at 4 (7th Cir. filed Oct. 23, 2000). On November 15, 2000, the Seventh Circuit denied petitioners' request. In light of these events, there simply are no remaining claims from which petitioners can claim a right to be free from litigating — and thus no conceivable reason for this Court to review the Eleventh Amendment questions presented in the petition.

Moreover, as demonstrated below, even if the district court had not dismissed the case in its entirety, there would be no "compelling reasons" (Sup. Ct. R. 10) for granting review in this case. Petitioners have neither demonstrated the existence of a circuit conflict nor shown a conflict between the court of appeals' decision and "relevant decisions of this Court." Sup. Ct. R. 10(a) & (c). To the contrary, both of the "alternative"

holdings on which the Seventh Circuit's decision rests are entirely consistent with this Court's decisions and the unanimous holdings of the courts of appeals.

II. THE SEVENTH CIRCUIT'S HOLDING THAT PETITIONERS WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY BY PARTICIPATING IN THE ACT'S FEDERAL REGULATORY SCHEME DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

A. As an initial matter, petitioners' contention (at 11) that "Congress may not use its *commerce power* to condition state participation in the federal scheme on a state's waiver of its constitutional sovereign immunity" improperly conflates two distinct legal concepts: waiver and abrogation. As this Court's decisions — especially *College Savings* — make clear, the former involves voluntary action by the states, while the latter occurs through unilateral Congressional action. *Seminole Tribe* established that Congress may not use its Article I Commerce Power to abrogate a state's Eleventh Amendment immunity. But petitioners' argument radically transforms that principle into the untenable proposition that Congress may not invite states to participate in the regulation of private actors through a federal regulatory scheme.

Petitioners expressly recognize (at 13) that "Congress may have the power under the Commerce Clause to preempt the states from regulating intrastate telecommunications (or allow the states to continue to regulate)," yet they ignore the well settled doctrine that federal regulation under the Commerce Power does not present Congress with an all or nothing choice. To the contrary, as this Court consistently has held, "where Congress has the authority to regulate private activity under the Commerce Clause * * * [Congress may] offer States the choice of regulating that activity according to federal standards or

having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. 144, 167 (1992). See also *FERC* v. *Mississippi*, 456 U.S. 742, 761-71 (1982); *Hodel* v. *Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 288-89 (1981). That is precisely what Congress has done in the 1996 Act.

The Seventh Circuit thus properly determined that the scope of Congress' authority to solicit waivers of Eleventh Amendment immunity does not turn on which of Congress's Article I powers authorized the pertinent legislative enactment in the first place. See Pet. App. 42a-43a (noting that "[t]he only difference between the classic example of a Spending Clause gratuity of federal funds and a waiver in our cases is that, with the Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator"). As the Tenth Circuit explained, "[t]he key to constructive or implied waiver under *College Savings Bank* is the voluntariness of the state waiver, not the particular power pursuant to which Congress enacted the statute. Under *College Savings Bank*, Congress may not exact or force a waiver from a state pursuant to any of its Article I powers." *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 937 n.4 (10th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). In short, the fact that the Congress has provided conditional benefits to the states pursuant to different Article I powers — the Compact Clause in *Petty*, the Spending Clause in *Dole*, and the Commerce Clause here — has no bearing on the constitutional validity of Congress's actions.

B. Petitioners next posit a conflict between the Seventh Circuit's holding that the Illinois Commission's participation in the federal regulatory scheme set forth in the Act constitutes a waiver of Eleventh Amendment immunity and this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). This

purported conflict results from a misreading of both *College Savings* and the Act.

In *College Savings*, this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit. 527 U.S. at 675-76. *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress has clearly conditioned on waiver of Eleventh Amendment immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. *Id.* at 676, 678 n.2, 686-87; see also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). At the same time, the Court made clear that a state does not waive its Eleventh Amendment immunity by simply engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *College Savings*, 527 U.S. at 687.

This Court illustrated through reference to its prior decisions the critical distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in "otherwise permissible activity" (which is unconstitutional). The Court first discussed (and overruled) its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. That decision, the Court concluded, was no longer tenable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could not use its Article I powers to abrogate unilaterally a state's Eleventh Amendment immunity. Because "a congressional power to exact constructive waivers of sovereign immunity * * * would

* * *, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," the Court overruled *Parden*. *College Savings*, 527 U.S. at 683. And because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its Eleventh Amendment immunity. *Id.* at 687, 691. In sum, *College Savings* held that Congress cannot make consent to suit a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such activity is a "sanction" that "coerces" a state into consenting to suit.

At the same time, however, this Court in *College Savings* reaffirmed its holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which together establish that Congress is free to condition a grant of money or authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact at issue in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

C. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls plainly on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

Notably, petitioners do not question the broad scope of Congress' authority, under the Commerce Clause, to enact legislation regulating local telephone competition. Nor could they. See *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982) ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). What petitioners appear not to grasp, however, is that, in the present context, Congress *has exercised* that very authority to enact a comprehensive federal legislative scheme governing certain aspects of local telecommunication competition. As this Court has noted, the states "unquestionably" have been preempted in those areas (*AT&T Corp.*, 525 U.S. at 378 n.6), and as a consequence they have no right to participate in the regulation of those areas under the new federal scheme. Congress, in its sole discretion, could have decided that the federal statutory scheme would be implemented exclusively by federal regulators.

Accordingly, administration of the Act's local competition provisions — including those relating to the arbitration, approval or rejection, and enforcement of interconnection agreements and to the approval or rejection of statements of generally available terms — is not an "otherwise permissible activity" in which a state may engage without Congress's permission. Rather, it is a wholly new activity, the terms and conditions of which were established by Congress to impose new obligations on incumbent LECs that are intended to foster a pro-competitive, de-regulatory national policy. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's federal regulatory program. As with the formation of an interstate compact, participating in the administration of a federal regulatory program as a deputized federal regulator is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a role in the administration of the "new federal regime." *AT&T Corp.*, 525 U.S. at 378 n.6. Among other things, states are invited, through their public utility commissions, to participate in the arbitration, approval, and enforcement of interconnection agreements between incumbent and competing LECs. Congress also made clear that if a state chooses to accept the invitation to serve as deputy federal regulators, it must consent to review of its actions in federal court. 47 U.S.C. §§ 252(e)(4) & (6). The imposition of this condition makes eminent sense, for as this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. And, finally, the Act does not compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state does decline Congress's invitation, the Act merely provides that the FCC will step into the shoes of the non-participating state regulators, applying the same federal standards, again subject to federal judicial review. *Id.*

As the foregoing demonstrates, petitioners simply are wrong in asserting that "states have jurisdiction" to perform their responsibilities under the Act "to begin with" and do not have to "agree to specific conditions to obtain such jurisdiction." Pet. 16. The 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The

opportunity to participate *as a regulator* in the implementation of a federal statute — an activity that did not preexist the 1996 Act and that Congress could have reserved exclusively to the federal government — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity ordinarily does not implicate unique federal interests. By contrast, when a state voluntarily acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. That is precisely what Congress intended to accomplish through its conditional invitation to the states under the Act, and any state that accepts Congress's invitation cannot escape the consequences of its voluntary action. In short, as the Seventh Circuit carefully explained, its decision follows inexorably from this Court's reaffirmation of *Petty* and *Dole*.

Moreover, the only other court of appeals to have decided whether the waiver of Eleventh Amendment immunity solicited under the Act is valid under *College Savings* has reached precisely the same conclusion, on the same grounds, as the Seventh Circuit. *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000) ("by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity"), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593).

Petitioners strain to manufacture a circuit split on the basis of *GTE North* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), but the Sixth Circuit's brief discussion of waiver, in a footnote (see *id.* at 922 n.6), was plainly dicta. The parties neither briefed nor argued a waiver theory in *GTE North*, because the district court's jurisdiction over the

preemption claim in that case was not based on the 1996 Act, but rather on 28 U.S.C. § 1331. *GTE North*, 209 F.3d at 912.[2]

III. THE SEVENTH CIRCUIT'S HOLDING THAT THE PSCW COMMISSIONERS COULD BE SUED UNDER THE EX PARTE YOUNG DOCTRINE IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

A. Prior to the Seventh Circuit's decision in this case, two other federal courts of appeals had addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 could be maintained under the *Ex parte Young* doctrine. In *Michigan*

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[2] Petitioners' do not (and cannot) cite a single case in which a court has held that the Act does not make sufficiently clear that the consequence of accepting Congress' invitation to perform federal regulatory functions is consent to suit in federal court. Indeed, even the Wisconsin district court (cited at Pet. 19) that ultimately (and erroneously) held that the Eleventh Amendment barred respondents' suits, concluded that the Act "provides clear notice to the states that their commissions will have to defend their rulings in federal court." *Wisconsin Bell, Inc.* v. *Public Serv. Comm'n*, 27 F. Supp. 2d 1149, 1156 (W.D. Wis. 1998); see also *Wisconsin Bell, Inc.* v. *Public Serv. Comm'n*, 57 F. Supp. 2d 710, 716 (W.D. Wis. 1999) (reaffirming that the Act "provides a clear warning" to state regulators), *rev'd on other grounds sub nom. MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653). Every other court that has addressed the issue of which we are aware has reached the same conclusion. See, *e.g.*, *MCI Telecommunications*, 216 F.3d at 938 ("Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity").

Bell Tel. Co. v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000), the Sixth Circuit answered that question in the affirmative, holding that such a suit "is a straightforward *Ex parte Young* case." As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * * for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* Subsequently, the Tenth Circuit reached precisely the same conclusion, expressly "adopt[ing] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000) (quoting *Michigan Bell*, 202 F.3d at 867), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

B. The principal basis on which petitioners seek this Court's review is a purported conflict between the Seventh Circuit's decision and this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). Petitioners' contentions are way off the mark.

1. Under *Ex parte Young* and its progeny, even where the state itself is immune from suit in federal court, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the

requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). As many courts have observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of his or her immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. at 159-60. Just last Term in *Alden* v. *Maine*, the Court stated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-48 (1999); see also *id.* at 757. The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and "to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

Under this Court's decisions, to determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Both MCI's complaint and Ameritech's counterclaim/cross-claim easily meet this test, because each (i) alleges that the commissioners required the inclusion of certain provisions as part of an approved interconnection

agreement that imposes prospective, binding obligations on Ameritech and that the mandated inclusion and enforcement of those provisions and obligations is inconsistent with federal law and (ii) seeks equitable relief from those allegedly unlawful obligations. Pet. App. 12a-13a.

2. Petitioners' contention (at 20-29) that the Seventh Circuit's decision conflicts with *Ex parte Young* itself is manifestly incorrect.

a. First, petitioners cannot point to any authority for their novel theory (see Pet. 20-23) that Congress must specifically authorize an *Ex parte Young* remedy. Indeed, were that the case, *Ex parte Young* would have been decided differently, because there is no indication that Congress specifically authorized the *Ex parte Young* remedy approved in that case.[3]

b. Petitioners' contention that a party must allege a "constitutional violation" in order to invoke *Ex parte Young* (Pet. 23-27) is contradicted by numerous decisions of this Court and the federal courts of appeals. Under long established precedent, a party seeking to restrain state action may, consistent with the Eleventh Amendment, maintain a suit "when the action sought to be restrained is without the authority

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[3] Petitioners are wrong in suggesting (at 21) that the remedies available to correct erroneous state commission determinations under section 252(e)(6) differ from those available to correct erroneous determinations by the FCC when it acts in the place of non-participating state commissions under section 252(e)(5). In either case, the relevant section 252 determinations are subject to federal judicial review, and a court of appeals reviewing an FCC determination under the Hobbs Act is no less authorized to order prospective injunctive relief than is a federal district court reviewing the actions of state regulators performing the same federal regulatory functions. In either case, the court's function is to ensure that those who administer the statute adhere to the dictates of federal law.

of state law or contravenes the *statutes* or Constitution of the United States." *Cory* v. *White*, 457 U.S. 85, 89 (1982) (emphasis added) (quoting *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 297 (1937)). In other words, "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), whether the source of that federal law is the Constitution, a federal statute, a federal regulation enacted under statutory authority, or federal common law. See *MSA Realty Corp.* v. *Illinois*, 990 F.2d 288, 291 (7th Cir. 1993) ("the federal courts may exercise jurisdiction over suits alleging violations of federal constitutional *or statutory law* that are brought against state officials") (emphasis added); 17 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4232 (1988) (Under *Ex parte Young*, a "federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly *or because it is contrary to a federal statute or regulation* that is the supreme law of the land") (emphasis added).[4]

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[4] Petitioners also suggest that an *Ex parte Young* action improperly interferes with the exercise of state agency discretion relating to the arbitration and approval or rejection of interconnection agreements. Pet. 26-27. Contrary to petitioners' suggestion, they do not have a right to misapply federal law without being held accountable for their actions. Once petitioners opted to participate in the arbitration and approval process under the Act, they were duty bound to ensure that the interconnection agreement they imposed on Ameritech comported with federal law. Simply put, under the Supremacy Clause, petitioners have no discretion to violate federal law when discharging their duties under the Act. As this Court held in *Ex parte Young* itself, state officials' "general discretion regarding the enforcement of the laws * * * is not interfered with by an injunction which restrains the state officer from taking any steps toward the

c. Finally, petitioners contend that the Seventh Circuit erred in allowing respondents to proceed under *Ex parte Young* because respondents "sought a declaration that the ICC violated the law in the past" (Pet. 29), and thus did not allege the "ongoing violation" that *Ex parte Young* requires. Petitioners' suggestion that their orders have no "ongoing" effects and, at most, constitute past violations of federal law is simply wrong. Under section 252, if the parties cannot agree on what terms and conditions are required by the Act, state public utility commissioners step in as *regulators* and "impos[e] appropriate conditions as required to implement" the federal Act. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1). The state officials then require the parties to put those obligations into an interconnection agreement prior to seeking final approval. 47 U.S.C. § 252(e)(1). In performing these functions, petitioners exercised *coercive regulatory power*, and what resulted from their exercise of that power was a carrier-specific government regulation that is legally binding on the parties unless and until it is set aside by a federal court pursuant to section 252(e)(6).

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enforcement of an unconstitutional enactment, to the injury of the complainant." *Ex parte Young*, 209 U.S. at 159. As the Court explained, "[a]n injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.*; see also *Poindexter* v. *Greenhow*, 114 U.S. 270, 290 (1885) ("the distinction between the government of a state and the state itself is important, and should be observed"); *id.* ("whatever wrong is attempted in [the] name [of the state] is imputable to its government, and not to the state, for, as [the state] can speak and act only by law, whatever it does say and do must be lawful"). Where, as here, a complaint (and counterclaim/cross-claim) properly alleges that state officials have committed ongoing violations of federal law, petitioners' reliance on the concept of discretion is misplaced.

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in its agreement with MCI are available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection orders that Ameritech is challenging here have "ongoing" legal consequences. Indeed, it is well established that an official capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought operates prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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